Of Capital and Other Punishments

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In a country like India where extreme social stratification and increasing social turmoil are likely to sharply affect the ideas and opinions of people, including judicial officers, putting in human hands the discretion to take life can he quite dangerous. Conflict and turmoil apart, the very deep stratification of Indian society makes even-handed dispensation of justice a problematic thing in the best of times. We live in times of severe social turmoil and the ascendance of the extremely illiberal politics of the Hindu fanatics. As this mood catches on we are going to find the courts silently handing out more and more harsh punishments bending backward to look at evidence from the policemen \s point of view and sending more and more people to the hangman. It is in this context that the debate on capital punishment must be conducted.

THE debate about death penalty is one of the endless debates of modern times. That it is endless is understandable, for there is death at both ends of the argument: the one who is to be killed at the hands of justice has himself killed, usually at the irrigation of his own sense of justice, or (more commonly), injustice. And so every argument about the preciosness, the sacredness or the merely secular right to life can be answered with equal force from the other end. Small wonder then that the argument goes in circles. There are those like V R Krishna Iyer who lakes the consistent stand that all life is precious and nobody - nobody at all - has the right to take life, lie bases his stand as an abolitionist on this argument (among others). The anti-abolitionist may argue that notwithstanding the consistency of this position, while the state may well heed its reason and desist from hanging murderers, citizens are unlikely to give up killing, and Krishna Iyer's pleas are not going to stop them. So may not the state hang a few of them to deter a few others from killing, and thereby save some lives - precious lives - in the aggregate?

Not that Krishna Iyer has no other arguments left, but he would have to leave the terrain of preciousness of life to continue the debate. Preciousness (spiritual or secular) of life is a meaningful moral value, but it is an inadequate ground for distinguishing the two ends of the argument about capital punishment. The efficacy of execution as a form of punishment then enters the debate. And so we have arguments about the purpose, effect or impact of capital punishment as an act of state. Here the two poles of the argument are less symmetrical and hence the debate is more fruitful. That it is still inconclusive is a reflection of the fact that we would rather not punish anybody at all in the name of justice, for the cruelty that is inherent in punishment, any punishment and not just execution, is at odds with the lofty sense conveyed by the expression Justice, and yet we do realise that we cannot as yet (perhaps for ever) do away with socially inflicted punishment, even if we feel confident enough about our civilisational strength to rule out private revenge as a legitimate response to crime, for then the weak (whether by virtue of social structure or contingent factors) would be at the mercy of the strong. Then, where exactly do we draw the line between just and unjust punishments? How do we ensure a criterion of punishment that will simultaneously be just to the one who has committed the crime (for a signal difference between private revenge and public justice as a response to crime is that the latter must do justice to both sides) and yet leave us with the confidence that by its operation it will ensure that the weak are safe from the depradations of the strong (which is the only rationale - and real one - for the existence of a public justice system)? This is not a very easy question to answer.

One way out of the dilemma is to reject the claim of contemporary justice that its punishments are intended to protect the weak from the strong. One may argue that on the contrary the law in contemporary society (in its essence) actually protects the strong from the weak, and that is what its norms and the punishment it inflicts upon transgressors of the norms are aimed at (again, in essence). The primary or essential function of law and justice, in such a critique, is to protect property and unequal order from the propertyless and the oppressed, and not the protection of the weak from the strong, and hence the rationale claimed for the punishments the law inflicts is spurious. This pulls the rug from under the feet of the criminal justice system and leaves no basis for the defence of death penalty, or any penalty for that matter.

There is undoubtedly a certain force to this argument, whether or not it can be established that the primary or essential role of law and justice is the protection of the privileged classes from their victims. That depends on where one locales the primacy or the essence, and how one understands those terms. If primacy is understood in the sense of determination and is deduced from the a priori theoretical position that the determinate role of the law (as a moment or element of the social superstructure) is the protection of property relations, then evidently so long as property relations are unequal, the law's essential function would be the protection of property from the propertyless. and any rationale it claims on the ground of the occasional protection it offers to the weak from the strong only serves to legitimate its esentially iniquitous role, If, on the other hand, primacy or essence is not understood in the sense of determination but the significance that law and parameters of justice have (a significance they share with ethical norms codified in religion and custom) in the historical search for norms of human relations in a humanist paradigm of history, which search runs through and is stamped by but not negated or rendered meaningless by the gamut of unequal social systems and hierarchical orders that the history has traversed, then it is doubtful that the protection of privilege from those that lack privilege can be described as the primary or essential, let alone determinant, role of law and justice (as well as ethics) in history as we know it, though it is evidently one significant role they play. (In speaking of such a search, it must be added as a matter of caution, for the history of this century dictates caution in inventing or discovering supra-human 'agency' in

may still be pointed out that they do not always target those who are responsible for their iniquitous situation but rather take it out on society in a random manner, often injuring equally helpless people. The killers of Rajiv Gandhi, whatever their reason for taking revenge upon the former prime minister of India, also killed a lot of other bystanders. Chalapati Rao and Vijayavardhana Rao killed bus passengers who were in no way responsible for their poverty and unemployment, much less their status as dalits in Hindu society. Muslim youth who feel they are justifiably driven to violence by the fast increasing intolerance of Hindu society take revenge with their bombs on train or bus passengers at random. Thus the argument against death penalty based on social considerations is less attractive than it appears at first sight, for there are (usually) helpless victims at both ends. But it is nevertheless not rendered invalid, for the two are not symmetrical There is either compulsive or thoughtless violence on one side and structured iniquity and systematic prejudice on the other. What this consideration tells us is not that we should be heedless about the social consequences of the retention of the death penalty, but rather that marginalised groups should be politically cautioned against wayward acts of revenge, and that we should under no conditions indulge in unthinking glorification of all "subaltern' rebellion, seen in isolation from surrounding social and moral conditions, within a binary (elite vs subaltern) universe.

But ignoring for the moment these social considerations and reverting to the question whether the retention of a rarely imposed death penalty serves any purpose at all, it may be argued even if it is imposed rarely, the very presence of the penalty will act as a deterrent. The fear should be there in the heart of every would-be murderer that he may - just may - be hanged. That, it will probably be said, will act as sufficient deterrent. To tell the truth, it will also afford us the moral satisfaction that retribution is available in law for the victim' Punishment is perforce discussed these day s in terms of deterrence, both inside the courts and outside, for we have reached a stage in civilisation where one does not in polite talk speak of revenge as a legitimate response to crime, but a stronger motivating factor that beats in all hearts -judicial as well as lay - is a desire for retribution, which is a somewhat inoffensive sounding substitute for plain old revenge. The special judge of the TADA court at Poonamallee, Chennai, who sentenced the whole lot of the accused he tried in the Rajiv Gandhi case to death, explained his decision in the language of deterrence: that hereafter, no foreign conspirators or terrorists may use Indian soil for their nefarious conspiracies. Karthikeyan, the CBI chief who prepared the charge-sheet, is said to have exclaimed to press persons outside the court that retribution had been done. Were not the judge and the policemen really saying the same thing, though the former put it in the reasonable sounding language of deterrence, for deterrence of crime may be accepted as one of the rational aims of judicial punishment, and the other more popular language of retribution, which is revenge with the subject transferred from the victim to impersonal morality? Legal theories of punishment describe deterrence and retribution as two distinct aims or modes of understanding of punishment, but in fact the argument of deterrence often hides behind it a desire for revenge, vicarious revenge, which is given a moral tone by being described as retribution. We all feel that the one who has caused suffering must suffer in equal measure and only then justice is done. This feeling is one of the universal of the human moral sense and lies behind much thinking about formal or informal punishment. To the extent that the individual who has caused the suffering is fully, solely and consciously responsible (which means, never at all) for that act, there is nothing very perverse about this common feeling. But the question is whether public justice - justice done in the name of society - must stop with this personalised notion of justice, or incorporate within its understanding the notion of reform through compassion and mercy taught by the greatest teachers (religious or secular) of social ethics, and the considerations advanced by the more recent analysis of the social and psychological causation of crime. The desire for retribution, often hidden behind the reasonable sounding language of punitive deterrence, is ignorant of both the compassion of the ancient moral teachers and the modern sociology of crime.

But since deterrence is the strongest argument for the retention of stringent punishments, including capital punishment, it will not do to 'deconstruct' it to discover a desire for retribution hidden behind it and then proceed to refute the reasonableness of retributive justice. The argument about retribution can come later, but let us deal with deterrence as such, taking it at face value, notwithstanding that its cold calculus often hides an irrational passion for revenge.

DETERRENCE - A VALID END OF JUSTICE

Is deterrence of crime a valid end of justice, and therefore a valid measure of punishment? The moment we pose this question we are confronted with a certain unease, which brings back the radical critique of law into our argument. In speaking of the legitimacy of deterrence of crime as an end of the criminal justice system, we seem to be accepting the legitimacy of the law's notion of crime in toto. But there is crime and crime, and not all of it is criminal to every viewpoint There is the crime of the landless poor who trespass on to the land of the rich who have aquired it (whether lawfully or not) other than by the honest sweat of the brow' There is the crime of the systematically oppressed person who breaks out of the bonds of oppression one day to do away with the oppressor. There is, on the other hand, the crime of untouchability, rape or dowry killing. And further there is (on the third hand, shall we say) the crime of a drunken brawl on a pay day's evening. Which is the crime whose deterrence one is talking about? To say that punitive justice may validly seek to deter rape is alteast a sensible proposition. To say that it may seek to deter neighbours from coming to blows over the disposition of a boundary wall makes less sense but still some sense. But to say that it may seek to deter the poor from encroaching upon a rich man's estate even to put up a hut, or a battered wife from breaking a brick on her husband's head when he is safely asleep, does not even seem to make sense as an end of justice.

One may then make out two lists of crimes: one which one will accept as truly a list of crimes, and with reference to which one will discuss the question of deterrence, and a second which one will not accept as crimes f)t al), let alone discuss the merits of deterrent action for preventing them. The difficulty with this strategy lies not only in the obvious fact that different people, or atleast different social groups, are bound to have different lists, thus rendering the notion of 'deterrence of crime' impossible to discuss in concrete terms. More than this is the difficulty that even within a given classification, there are bound to be many uncertain cases, too many to make it a usable classification at all. For instance, let us grant that it is not a crime for a landless person to encroach upon a big estate to put up a hut or to carve out a

plot to cultivate. Is it also not a crime to encroach upon the land of a two-acre peasant? Or a half-acre peasant? It is not a crime, let us grant, for a wife subjected to regular beating to poison her husband's coffee' But what if it is a lesser matter of marital discord? And so on. Anyone who tries to break up penal law into those crimes that one will (from whichever point of view) definitely accept as crimes, and those that one definitely will not, will discover that there are too many undecidable cases to make it a worthwhile classification.

But there is an ever greater problem. Law's universality is a necessary precondition for rule of law to be operational Used. You cannot have a fractured universality forlaw and stilt have a society and state where rule of law prevails. If each of us is allowed to pick and choose that part of law which we will accept as legitimate, will abide by, and expect the state to force everybody else to abide by, and if this list (apart from its inevitable indefiniteness) changes from person to person (or atleast social group to group) then no kind of law-bound society or state is possible' Why should that worry us, it will be asked. That should worry us because a lawless society and state are most injurious to the weak and the vulnerable. However iniquitous a given law or legal system may be, there can be nothing more iniquitous and injurious for the poor and the weak than a society in which there is no rule of law at all. (One is not speaking here of small or ethnically uniform custom-bound communities that need no law at all). Hence what we require. in the interests of the poor and the weak, is not an attitude that rejects the legitimacy of the law as such, but one that accepts it, but without giving up a critical attitude towards the social content and significance of the statutes and legal practices that make up the law. (Ofcourse' if the law is itself fractured' by denying equality of all before itself, and minimum respect for the person of all, then that is no rule of law at all, and these considerations do not apply to such legal systems). It may be objected that this caveat that one does not give up a critical attitude towards the law is intended only to salvage one's troubled conscience and serves no purpose when the legitimacy of the law as such is concede'! That is not the case- Indeed this critical attitude is precisely where a meaningful radical engagement is taken up with the criminal justice system (whose legitimacy as such must be conceded a priori in the interests of a law-bound society outside which the poor and the weak would be helpless). The critical attitude would help the struggle for sensitising the law to its social context and content, that is, give it a sense of social equality over and above the legal equality and respect for persons that it must possess to be called law at all, thereby paving the way for a progressive democratization of the law that would simultaneously make the law less oppressive and leave open more freedom for positive acts of social transformation. There could well be situations where such transformation would require breaking with the law (not individual laws, whose infringement is common in any effort at transformation, but law as such) but that would only be a temporary interregnum and even then an extreme choice whose ineluctability must be stark enough to compen sate the i njury that the total fracture ofruleoflawdoestothe people, especially the weak and the vulnerable. More germane to the present discussion is that accepting the legitimacy of the criminal justice system as such, but maintaining an attitude of criticism towards its social content, in particular' which act is called a crime and how much of a crime, helps one evolve a useful critique of the punitive aspect of the law, including the meaning and content of often used expressions such as deterrence and deterrent punishment.

Let us now get back to the question: is deterrence of crime (any crime) a valid end of justice, and therefore a valid norm of punishment? It is indeed a valid end of justice, provided it is understood that it is only one of its ends and not the whole of it, and also provided it is understood that only a part and not the whole of the burden of deterrence is upon the criminal justice system. Justice being more than the prevention of crime, deterrence can only be one of its tasks. And public justice being justice done in the name of and on behalf of society, it is society as a whole that carries the burden of deterring crime, the criminal justice system carrying only the appropriate part of the burden . And the role of deterrence as a norm of judicial punishment must be located within this understanding.

As an aim of punishment, the concept of deterrence is used in three different senses (even in judicial pronouncements): (i) the possibility of punishment acts as a deterrent to crime; (it) the punishment deters the criminal from repeating the crime; and (iii) punishment given to one criminal will deter others from committing the crime. Since all three meanings ate jumbled up and produced as a single argument in defence of harsh punishment for heinous crimes, it is necessary to separate them out. Of the three, only (i) is valid, and that too within limits, but not (ii) or (iii). To measure punishment by the requirement that the criminal should not repeat the offence is to assume that circumstances impelling the crime are of no importance and the criminal's will is all. It is indeed close to assuming that crime springs from a permanent part of the person's character, which will repeat itself ever and again unless deterred by violent punishment. Even if there is something kinky about the person's character, punishment may not be the best way to ensure that the crime is not repeated. Towards one who has committed an offence, the proper attitude would be to seek methods of helping him grow out of whatever it was that impelled him to commit the offence. In other words, an attitude of reform, not only of the person but also of his circumstances. Reform of person is likely to work better with crimes born of perversity of outlook than crimes of passion or want. With crimes of want what needs to be reformed is less the convict than the conditions of his life. But perhaps a little of both will be required in all cases, for these causes of crime are difficult to sort out in pure form. However, reform of person does not mean merely lecturing or counselling the person. It would (except in unusual circumstances) include some punishment which would entail the convict forgoing something - freedom, comfort, etc - that is part of normal life. It may also involve some positive activity on his part, whether the kind of labour that convicts in Indian prisons undertake or work that has more of the character of service to other people. Punishment of some sort is therefore integral to the process of reform of the person, to the extent that it is reform of the person and not of his circumstances that justice calls for. And it is this role of punishment - the role of rendering the convict repentant or atleast in a mood to contemplate himself and his circumstances, and therefore amenable to the process of correction that should determine its severity, insofar as we are thinking of punishment *vis-a-vis* one who has already committed a proven crime. Deterrence in the sense of (ii) is an illegitimate notion. Can capital punishment be a possible punishment from this point of view? Evidently not, for you don't put anybody in a repentant of reflecting frame of mind by chopping his head off Exceptionally pathological cases are best shifted to what are popularly called 'mental hospitals'.

The meaning (iii) given to deterrence should not be confused with (i), The latter simply says that the statutory indication of punishment is necessary as a deterrent to crime. The former goes well beyond this, to an impermissible extent. It says X should be given such a punishment that Y will be deterred from- committing that offence in future, whoever that Y may be and whatever hi& circumstances. That makes X responsible for not only the crime he ha' committed, which is permissible provided he is not automatically saddled with the full responsibility minus necessary consideration of the circumstances in which he authored the crime, but also for the crimes unknown others may commit in the unknowable future. The only example the law can legitimately make of one for others is to show that the punishment that is written in the statute book will actually be imposed, if and where the culpability is established, and is not merely decorative. But the punishment actually awarded should be strictly guided by correctional considerations relevant to that person, and not that of setting an example' to others. When the TADA special judge at Chennai says that he is sentencing to death all the 26 persons he has tried so that other such conspirators may not spill blood on Indian soil in the furtherance of their anti-national designs, he is using the notion of deterrence in the impermissible sense of (iii) and not the permissible ,sense of (i).

If this is clear, then can capital punishment be justified by the role of deterrence in the sense of (i)? Is death penalty (even if rarely imposed) a necessary deterrent for the crime of murder (the only common crime for which it is imposed in India,'? We have said earlier that punishment has a role to play in correction, too. The possibility of punishment also acts as a deterrent. Nobody is deterred by the threat that 'if you commit a crime, you will be reformed in jail'. The punishment part of the reformative effort can act as a deterrent. The actual punishment given must never be 'deterrent' but only as much as is necessary as an accompaniment of correctional efforts. But the maximum possible punishment may be fixed from the point of view of deterring crime. Is the maximum of death sentence a necessary deterrent for homicide? Let us forget the empirical evidence for a while: studies conducted in countries which have abolished the death penalty (56 countries have statutorily abolished it, and close to 100 have got rid of it for all practical purposes) show that death penalty has little additional deterrent effect, that is the rate of commission of crimes punishable with death has not increased significantly after the abolition. Such a study can be done in India, too. The princely state of Travancore-Cochin had abolished the death penalty for a while before it became part of India. When it became part of the union in 1947, it got the Indian Penal Code along with the other blessings of accession. It would be worthwhile making a comparison of the number of crimes of murder per capita registered in that part of Kerala during and after abolition. It is unlikely that such a study will reveal a trend contrary to what has been the experience elsewhere. The reason is not that punishment has no relation to crime (in which case it would be no deterrent at all) but rather that the two are not so simply or linearly related - like the two sides of a balance - that when the one goes up the other goes down to the same extent. Between crime and punishment there lies the whole sphere of human existence, social, economic, political, cultural and the purely individual

But such studies apart, let up look at the logic of this argument that the provision of death penalty can alone be an adequate deterrent for murderes, The logic appears to be that the threat: "if you take a life' then you will have to lose yours' will alone work effectively, and it should be present in the law, if only as a rare option. That is to say, like suffering for suffering caused (if only in the rarest of rare cases) is necessary as a deterrent. But why does this logic apply only to homicide? Why not to all crimes? If a hand is chopped off, the court does not order the chopping off of the convict's hands, but only a few years in jail. There will never be like suffering because even after a few years in jail, the convict will be able bodied whereas the victim will be without a hand all his life. Yet nobody would argue that hand-chopping for hand-chopping (atleast in the rarest of rare cases) would alone he an adequate deterrent. Or arson for arson, destruction of property for destruction of property, etc. (And what would be an effective deterrent for rape in this logic? Chopping off the penis?) On the contrary, any such suggestion would undoubtedly produce protests about the medieval logic of 'eye for eye and tooth for tooth' and would bring forth outraged comparisons with Saudi Arabia, the Taliban's Afghanistan and all those countries ruled by mullahs than which we all believe we are infinitely more civilised- But why is this logic of like suffering for suffering caused preferred in the case of the death sentence alone?

The death penalty excepted, the modern Indian penal law has a uniform punishment for all crimes (excepting very petty ones, for which a monetary fine may suffice), which is supposed to simultaneously act as both deterrent and corrective. The convict is deprived of freedom and comfort by being jailed for a certain period. The prospect of such deprivation is supposed to act as a deterrent, as well as keeping society out of his arms' reach for a while, and the fact of deprivation is expected to engender in the convict a state of remorse that may act as a corrective, though very little is done positively for correctional purposes by our penal system. There is no need to break with this logic and invoke the deterrence of eye for an eye as an exceptional punishment for murder What is needed, on the contrary, is to further humanise this logic of incarceration as deterrent as well as corrective, that is to think of less in human deterrence and more positive correction. People who have never seen the insides of an Indian jail may feel that 'inhuman' is too harsh a word, considering that Indian prisoners these days (atleast in the less benighted states) get three meals a day, with meat once a week and opportunity to play outdoor games and watch TV (usually once or twice a week). Our prisons are nevertheless less than human, firstly because the quality of the food given is usually very poor, and overcrowding (all Indian jails are overcrowded to the tune of 50 to 100 per cent of their capacity) makes the jails extremely unhygienic. But that apart, the prisoners are deliberately made to feel less than human, as part of the tactics of prison discipline. All wielders of authority know that the simplest way to control their subjects is to structure their relation with authority in such a way that they are systematically made to feel less than human. Beating at the slightest excuse is one way to achieve this. But even the refusal to have a dialogue with the prisoners on even the most inoffensive matters;, and instead converting all situations of possible dialogue into fearful supplication on one side and unreasoning refusal or inattention on the other, compounded by humiliating abuse and physical violence at the slightest provocation, creates an ambience of a circus ring rather than a place where human beings are incarcerated for correctional purposes.

This is is not accidental. I am not speaking here of any functional need of the ruling classes to create subhuman prison conditions as a strategy of stable governance. That degree of rationality is difficult to

demonstrate though easy to declaim. But subhumanity of prison conditions is systematic and not accidental in a different sense. Most, policemen and prison officials (and, I dare say, many judges too) believe that the prison sentences provided by the penal law are by themselves not sufficiently efficacious as a deterrent of crime, and must be supplemented by an inhuman treatment that is no where written in the law. This feeling is linked to the lowly perception that minions of the state have for crime and criminals who mostly come from the lowest strata of the caste system. That is to say, the humanism of correctional incarceration may be all right for civilised people like you and me but not for the likes of the castes and communities that are found committing crimes most often. (This remark is not imagined. It is frequently expressed by police and prison officials, and quite frequently lies behind the attitudes of officers of the courts,)

The point of saying all this is that there should be better and less inhuman ways of ensuring a deterrent punishment than locking up convicts in prisons controlled by jail officers who are all convinced in the heart of hearts that mere incarceration in a prison is no deterrence to the criminal, especially the criminal who comes from the wretched dregs of Hindu society. Nor do these prison officers have any motivation for correctional work. A correctional institution needs some degree of idealism, which is singularly absent from the mental make-up of the jail officers. But they are not alone to blame. The Indian prison as an institution has no correctional system as such, though it teaches the convicts some manual trade and provides them with what passes for a library to read from. More often than not, a prisoner comes out of jail at the end of his term a more hardened and less useful human being than he was when he went in. And that serves neither the purpose of deterrence nor reform. What the Indian prisons need today is a less harsh regime of imprisonment and a more positive correctional approach. Calls for imposition or retention of harsh punishment, including capital punishment, have no place in this.

Let us move on now to a different plane of argument. I will try to argue that imperfect societies have no right to impose harsh punishments' and that (as indicated earlier), punishment alone cannot be society's response to crime. The latter is very important today because not only in India but all over the world, the rise of political terrorism and other forms of organised law-breaking is sought to be made a justification for harsh punitive regimes. Imperfection has long been one of the abolitionist arguments, but that is imperfection of judicial appreciation of evidence, both because of human error and the social prejudices or world view held by the judge. Capital punishment has a finality to it that would be justified, other things apart, only by a perfect investigation and perfection in the judicial act of weighing the evidence, Neither is humanly possible. We remember Kehar Singh, the alleged conspirator in Indira Gandhi's murder, about whom all that was proved was that he conferred in secrecy with her assassins, but who was nevertheless found fit to hang. It may well be that judges from the court of sessions to the Supreme Court who believed then that it was just to hang him will have second thoughts some time later, for the judgement has been criticised by even otherwise not particularly radical people, but nobody can give back Kehar Singh his life. (There is a more recent case from England. Derek Bentley. hanged 45 years ago for abetment of a policemen's killing, has been now pronounced wrongly executed. The profusion of apologies rendered to his family will not resurrect the dead man.)

A different dimension of imperfection arises from social and political passions and prejudices that judges are as much prone to as anybody else. Not that they never make any effort to achieve objectivity. One may grant that much to judicial discipline, but there is no guarantee that they will always succeed, which guarantee is mandated by the finality of capital punishment, especially in times of social crisis and turbulence when even the need to make the effort may not be urgently felt But it is precisely in such times that both judicial and extra-judicial execution are likely to be more frequent, thereby leaving the socially and politically abnormal groups and individuals all the more vulnerable to execution by prejudice. An instance is the rhetoric of the Chennai special judge's reasoning in the Rajiv Gandhi murder case, in which all the 26 conspirators and abettors (only the conspirators and abettors fell to the judge's lot, for the actual perpetrators of the offence had all died before the law could catch them) were sentened to death- Half of them are Sri Lankan Tamils and the other half their local collaborators, and so the judge could indulge in patriotic anger about foreign terrorists executing their nefarious design on Indian soil. The LTTE connection being a fatal political sin in the current political mood - so much so that it could even bring down a government at the centre - it is not surprising that the rhetoric should end with a wholesale death sentence. The judgment has been described by what the presscalls "eminent jurists' as extraordinary, but suitable for an extraordinary case- Their memory is unfortunately not able to recall that even assuming that the murder of an eminent political personality is deemed different from that of a person in the street (Article 14 of the Constitution says otherwise), there was another Gandhi, certainly a more eminent one, who was murdered 50 years ago, in whose case only the perpetrator was hanged and not the abettor. It is in the case of the two later Gandhis, mother and son, that abettors were found fit to be[1] hanged. Judicial perception of culpability is evidently quite sensitive to changing political conditions, Such being the case' can the judiciary be trusted with the power to order execution of people? Quite some time back, the US supreme court had ruled that death penalty is discriminatory because it puts in human hands the arbitrary power of deciding which crime is worthy of capital punishment. That the US law-makers found a way of getting around this judgment, and that country continues to be one of the staunchest defenders of capital punishment, does not rob this observation of its reason. Especially in a country like India where extreme social stratification and increasing turmoil are likely to sharply affect the ideas and opinions of people, including judicial officers, putting in human hands the discretion to take life can be quite dangerous. It is extraordinary that, on the contrary, people find it possible to argue that precisely because of the social turmoil that defines contemporary India, capital punishment is needed as a deterrent, as if the turmoil does not affect judicial minds to the detriment of their impartiality, and as if the harm that can do to those on the margin of society is a matter of no consideration. Conflict and. turmoil apart, the very deep stratification of Indian society makes even-handed dispensation of justice a problematic thing in the best of times. All those familiar with the criminal justice system are aware of the extreme hostility exhibited by the system ~ policemen, judges and lawyers too - towards thieves, robbers and dacoits, not merely because of the respect for property that one may expect to find in the judicial systems of all countries, but also (perhaps more) because the perpetrators of such

crime (in particular, dacoit gangs) come from castes and communities that are held in loathing and contempt, often even more than the untouchable communities, by caste Hindu society.

But these are arguments concerning the imperfection of judicial decision-making. Over and above that is the imperfection of society's, any society's, moral order Let us turn to that now and argue the point that imperfect societies (in a specified sense) have no right to claim the privilege of harsh punishments. This may appear obvious, but it is necessary to argue carefully from first principles, for otherwise it may end up as mere rhetoric. Let us begin with the question: Can a public justice system take a person's life in the name of punishment, and still be said to have done justice? The question is not: is it at all just to take life. Notwithstanding the valuable caution of the fundamentalists of non-violence, that we who have no capacity to create life have no right to take it, we can all never-the less imagine situations of extreme oppression wherein the taking of the life of the oppressor cannot but be called a just act, which is of course no argument for a cavalier attitude towards all violence claimed to be perpetrated in the name of equity. Our question is more closely circumscribed: is it permissible for the institution of public justice to kill as a measure of punishment for crime, any crime?

Let us try to answer this question' What exactly does a court of justice do when it awards punishment to an offender? In a civil offence, justice recompenses the wronged person, that is clear. It hands back the misappropriated property, it restores the breached contract, or it computes and awards monetary compensation when such restoration is not possible. But that is not what it does in a criminal offence. Whether it is punishing as a deterrent measure, or as retribution, or as a measure of reform, it is doing something other than recompense the victim' except to the extent that punishment aimed at retribution gives some mental satisfaction to the victim or the victim's survivors. This satisfaction is frequently quoted by judges, though in impersonal terms, such as the 'moral anger or outrage of society" that needs to be answered or assuaged by the punishment awarded. This is often the argument used by judges to justify the award of harsh punishment when they sense that the usual argument of deterrence is not enough to justify the severity of the punishment they have chosen to impose.

Strictly speaking, this language should have no place in judicial thinking, though quite erudite judges continue to employ it, for if the desire for revenge that the victim of a criminal offence feels and with which society identifies or empathises—so that judges find it possible to say 'we have to answer society's moral outrage[1] instead of 'we have to satisfy the victim's vengeance' - can be a rational criterion of judicial punishment, then the judiciary is nothing but a seemingly public institution for serving private revenge, a seemingly dispassionate forum for satisfying private passion. But private revenge is explicitly ruled out by modern law as an answer to crime. Even the most morally justified revenge is disallowed. Can it then be smuggled in through the back door, dressed up in black robes, speaking the language of society's moral conscience, and set up as a Legitimate norm of punishment? Is it that the law's aversion to private revenge is only that it is private and not that it is revenge?

That is not the case. Human thinking about crime has always tended to see it, at least in one aspect, not as an injury to the person affected by the crime, but as an act upsetting society's moral order, that is the norms that define the contours of legitimate behaviour. Modern law has explicitly accepted this as the central characteristic of crime. A crime, whether it is theft, rape or murder, is primarily an offence against society, and only secondarily against its victim. Whatever the defects of this notion (one defect frequently pointed out is that it transfers the victim's "agency' as seeker of justice to the state acting on behalf of society, but that is not always avoidable nor necessarily bad), and whatever objection one has to society's moral order and its norms that are thereby shown as universal and legitimised (this objection too is well taken, but only up to a point, unless one can show that there is no element of universality at all in the given society's normative order), this is a useful perspective, for it allows us to think in terms that go beyond injury and revenge, prevention and punitive violence. If crime is that which upsets society's moral order, then punishment should be guided by the consideration of setting right the normative order disrupted. And the giving of the punishment is society's act, even if it is a particular institution of society that tries and punishes offences on behalf of society.

That we are speaking of the moral order and not just the legal order needs emphasis. Merely saying that a crime upsets society's legal order offers neither a justification nor a norm of punishment. If a law is violated, then so what? What justification or criterion of punishment do you derive from that? None, evidently. But behind the legal order lies a normative order, a universe of values, and that can offer a justification as well as norms of punishment, right or wrong, acceptable or unacceptable. The "ought' of the law is merely the policeman's dictate, but behind it lies an 'ought' of values which can be weighed as a moral code to decide what may and what may not society do when that normative order is violated. For if the normative order seeks legitimacy to impose itself by sovereign force on the ground that it is morally desirable; then restoring it back to shape is the only legitimate response to its disruption, that is, to any act of crime. And the principles that guide the means by which the restoration is effected must be - and must be declared to be - a part of that normative order, and not something external to and certainly not antithetical to the values of that order. Justification of judicial punishment and the norms thereof must flow from this. Just as judicial response to civil offences is to set right the wrong done to the individual judicial response to crime then is to merely set right the wrong done to society and its moral order.

It is perhaps necessary to clarify one point here. The moral order that we have set up as the object that the criminal justice system protects is not identical with the dominant system of moral values prevalent in that society. It shares something with it but is not necessarily identical with it. It is the system of norms revealed by the law, which lays down the contours of legitimate behaviour as understood by the law. The actual social reality, that is to say the socio-economic order, as well as the moral world view of that society, which again consists of at least two elements, one, the system of values widely held to be valid or desirable by (different social groups within) society, and two, the system of values that supposedly represent the higher truth by virtue of the dominant religious or political world view of that society, may well differ from the legal norms of legitimate behaviour. Take caste, for instance. Caste is a living part of actual Indian social reality. In terms of its moral standing, Hindu society views it from a partially secularised but still essentially brah-minical position. In terms of higher morality, it abhors the more extreme practices of caste, but the attitude towards caste as a whole has been vacillating between a secular world view and one

that sees some hidden principle of a righteous social order in it. The legal view of caste is, however, uncompromisingly secular Untouchability and related caste-based discriminating practices are very serious offences in the eyes of the law, the only discrimination legally allowed being the protective discrimination of reservations. Much the same can be said about gender, The normative order of the law is much more secular (though not entirely so, as in the case of caste) than social morality, and certainly very much more so than actual social reality. Or take the case of violence. Violence is very much part of our lives. Morally, it is not always regarded as wrong, especially when it is retributive in character. Though, at the level of higher morality, all of us arc supposed to believe in non-violence as a superior virtue. The law, for its part, abhors all violence except only that which is a direct act of defence of person or property, which is much narrower than the retributive violence sanctioned by popular morality. The situation is some what reversed when it comes to property. Our economic class structure is highly unequal, and popular morality is a mixture of envious acceptance (even abject reverence), and resentment (even hatred) of the fact. Higher morality affects an ascetic contempt for property. The law, however, is a ruthless protector of all property rights.

One can go on. But the point is that there is a clear normative order underlying the law, whose protection is what the law aims at. The normative order is not just the set of rules of behaviour one deduces from the law as present in the statute book. It is a moral order, a civilisational perspective of human social and material relations that the law encodes. Legitimacy of the law derives from this normative order. It is of course contested and not universal in the sense of being beyond argument, though there may well be clements of it that have achieved universal acceptance. But it is not spurious merely because the egalitarian or rights-giving parts of it are (possibly) at variance with the actual social order, or the dominant aspects thereof, (Of course, if the whole of the law were only a justification of inequality and injustice, then there would be no legitimacy at all but that is not the kind of law we are talking about) This view is at variance with one common radical view of law and legal justice, that where they appear to deservingly claim legitimacy for their suppressive force, they are only acting as a legitimating ideology for (or enacting a hegemonic practice of) the unequal social order. Such a view, as said earlier, leaves no space for any meaningful discussion of norms of punishment; and more importantly, it does not constitute an adequate understanding of the history of normative standards (whether of the law or morality) which reflects a ceaseless human search for norms of social behaviour, a search that runs through the ups and downs of exploitative and oppressive social systems and revolutions and rebellions, constantly accumulating new values, discarding or revising old ones, generating a corpus that can at any point of time be evaluated from the viewpoint of equality and freedom, and which has significance for actual social struggle for equality and

freedom, and also for the possible shape of the institutional mechanisms that may help structure an egalitarian society.

If, then, it is accepted that what a public justice system does when it punishes criminal offences is to act on behalf of society to correct the harm done by the offence to society's moral order (the normative order of its law, to be precise), then it is possible to think of how much punitive violence justice may be legitimately allowed. Obviously, it cannot be allowed any greater self-righteousness in responding to crime than the righteousness of its normative order. In other words, how harsh the law may be on offenders must be limited by how just its normative order is. No society known to us is so perfect that it can demand the right of harsh punishments, such as the capital punishment, nor will there ever be. It may be said that the criterion of 'justness' of the moral order is vague and subjective. But since inequality - of status, opportunity, endowment, respect, freedom, consideration for individual peculiarities, etc - is what alienates people from the social order in which they live, and makes them prone to violating its norms' the apt criterion for justness here is the absence (relatively speaking, of course) of such inequality.

It will be immediately perceived that there is a trap in this otherwise reasonable argument: it seems to imply that the more just the normative order of a society, the more right it has to impose harsh punishments, and therefore that a perfect society may execute every criminal. This is, of course, the logic with which communist-ruled countries (irrespective of whether they have actually been perfectly just societies) have always justified their illiberal justice systems' One answer to this perverse interpretation is that the argument is not meant to be used in the converse direction. It is like the dictum that only those who have never sinned should hasten to throw stones at sinners, which does not mean that the less one has sinned, the more stones one may throw. More positively, the norms of punishment are not something external to the normative order which the punishment seeks to protect. They axe part of it. Therefore a society which is otherwise perfect but imposes harsh punishment on transgressors of its norms would not meet the criterion of a just society, for a correctional attitude as against a retributive or merely deterrent attitude of judicial punishment is part of the justness - in the sense of equal consideration for the normal and the aberrant - of the normative order.

But that is not all We have said that punishment as given by a public justice system - as distinguished from private revenge - is aimed at restoration of the moral order of society violated or disrupted by the offence. But can judicial punishment do all of it? Or is it properly to be seen as only one of the mechanisms of societal response to the disruption of its moral order? Most of the arguments in defence of harsh punishments, in particular the capital punishment, assume that judicial punishment is the total answer to crime. But if judicial punishment is what we have identified it to he, it can never be the total answer to crime, and therefore it need never be and can never be as harsh as the crime, as cruel as the criminal. The usual argument (a very popular argument in defence of capital punishment) that there is nothing wrong if the judicial response to crime is cruel when the criminal is cruel, places the offender and justice on par. This is wrong for two reasons. One is that the individual is seeking some private gain or retribution whereas justice is acting on behalf of society to restore to shape the normative order disrupted in that process by the offender; it certainly does not seek retribution, and deterrence, within limits, is only one of the goals aimed by it in its job: and secondly, the criminal justice system is not the whole of the answer to crime. Society must act through its various wings to effect the restoration of the order disrupted, of which the institution of punitive justice is only one (though a necessary and legitimate one). Confronted with an act of crime, society should consider that it could have been occasioned by three possibilities: a lack in the normative order, a mismatch between the normative order and the actual social conditions or possible human asociability, or a fault of the offender himself. Indeed, usually the three are not easy to separate. Societal response, a part of which is structured through the criminal justice system, must address all the three possible facets of crime, It can never put all the blame upon the individual's wilful and perverse disobedience of the law' and reduce the whole of crime to the domain of criminal justice; and answer cruelty with cruelty, violence with violence. It is this logic that results in the fervent arguments heard whenever the criminal justice system fails to deter crime, that its institutions and norms should be made more stringent, given more 'teeth' (a rather telling piece of canine imagery), etc. On the contrary, societal response, while including within its ambit a corrective and (within limits) deterrent penal system, should concentrate at least as much on a self-critical- look at itself, its actual condition, its normative order, and the position of human individuals and groups within either of them. Capital punishment, or any kind of harsh punishment' not to speak of tolerance of extra-judicial punishments inflicted by the police or armed forces, are ruled out because they put excessive blame on the individual's - or the dissident group's - perverse rejection of the law, and moreover reduce criminal justice to an answer in kind.

We live in times of severe social tunnoil, crisis and the ascendance of the extremely illiberal politics of the Hindu fanatics. The crisis and the turmoil provide them with enough scope to legislate their illiberal attitudes with unreflecting popular sanction. Most people feel understandably disturbed by the mindless bombings of trains and buses in Coimbatore or Thrissur and the equally mindless killing of Hindus in Doda and Poonch; by the stories of rape in Rajasthan and gangsterism in Bihar or Uttar Pradesh. This mood has already got the Hindutva forces going: they have blackmailed Karunanidhi (not that he is an angel but he had no need to be a devil) into enacting an anti-terrorist law for the state least affected by violence, and Advani promises agitated protestors about rapes in Rajasthan that this country will soon hang rapists. He advises naxalite-affected stales of south-central India to look upon the People's War as purely a problem of crime, and draft repressive laws to the dictation of the police. He will no doubt be saying the same thing to Farooq Abdullah, who is in any case ready to crawl when he is only asked to curtsy. As this mood catches on - the communal fanaticism and the general iliiberality and inhumanity of the Hindu fanatics is a mood that goes well beyond the votes they get - we are going to find courts silently handing out more and more harsh punishments, bending backward to look at evidence from the policeman's point of vie w (one comment frequently made about the Rajiv Gandhi case judgment is that it is the charge-sheet suitably rewritten to look like a judgment), and sending more and more people to the hangman. At the end what we are going to have is not a solution to any of the social or political problems underlying this degeneration but only a more harsh and inhuman criminal justice system' Today's debate about the capital punishment must be seen in this context,